

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BARD WATER DISTRICT,

Plaintiff,

CASE NO. 13-cv-2727 JM (PCL)

**ORDER GRANTING MOTION TO
DISMISS WITH LEAVE TO AMEND**

JAMES DAVEY AND
ASSOCIATES, INC., an Arizona
corporation, JAMES DAVEY, and
DOES 1 through 50,

Defendants.

On March 19, 2014, Defendants filed a motion to dismiss Plaintiff's complaint for failure to state a claim. (Dkt. No. 12.) Plaintiff filed an opposition to Defendants' motion on April 21, 2014, (Dkt. No. 13), and Defendants filed their reply on April 28, 2014, (Dkt. No. 14). Having reviewed the parties' arguments, the court finds this matter suitable for resolution on the papers without oral argument pursuant to Civil Local Rule 7.1.d.1. For the reasons set forth below, Defendants' motion to dismiss is GRANTED with leave to amend.

BACKGROUND

Plaintiff is a public water district with its principal place of operation in Winterhaven, California. Defendant James Dave and Associates, Inc. is an Arizona corporation with its principal place of business in Yuma, Arizona, and James Davey

1 is an individual and an officer of James Davey and Associates, Inc. residing in Arizona.

2 In April 2005, Plaintiff alleges Defendants entered into a written contract with
3 Plaintiff, entitled "Contract Documents – Reservation Main Canal Improvement
4 Project, Schedule I (2004), Concrete Canal Lining" ("Project Documents").
5 Defendants prepared the Project Documents and stamped them with James Davey's
6 seal indicating he is a registered civil engineer in California. Plaintiff attached the 150-
7 page Project Documents as Exhibit A to the first amended complaint. (Compl., Ex. A
8 ("Project Documents").) In the Project Documents, Plaintiff alleges Defendants agreed
9 to serve as project engineer ("Project Engineer") for the Reservation Main Canal
10 Improvement Project (the "Project"), located in Imperial County. Plaintiff contends the
11 Project Documents specifically detail the authority and obligations of Defendants while
12 serving as the Project Engineer, including their duty to supervise and inspect the work
13 of the general contractor and carry out specific testing requirements.

14 Pursuant to their Project Documents, Plaintiff alleges it relied on Defendants to
15 ensure enforcement and compliance by the general contractor with the terms of the
16 Project Documents. Plaintiff further contends Defendants owed Plaintiff a fiduciary
17 duty as the Project Engineer to ensure that the Project Documents were enforced.

18 In the complaint, Plaintiff alleges two claims against Defendants: (1) breach of
19 contract, and (2) breach of fiduciary duty while serving as Project Engineer, Plaintiff's
20 agent under the contract. Plaintiff alleges Defendant breached the terms of the Project
21 Documents by unilaterally waiving, in contravention of the contract documents and
22 without Plaintiff's knowledge or consent, the testing and inspection requirements and
23 by failing to ensure the general contractor complied with the contract. Specifically,
24 Defendants allegedly waived the required inspections and tests to ensure that the beds
25 of the irrigation ditches were properly compacted and otherwise prepared to receive the
26 concrete ditch lining. Thereafter, Defendants allegedly failed to disclose and concealed
27 these breaches from Plaintiff until November 15, 2009, at the earliest. Plaintiff alleges
28 Defendants' breaches and failure to comply with their contractual responsibilities

1 resulted in the widespread failure of the ditch lining throughout the Project and
 2 damages in excess of \$75,000. Given the amount in controversy and the diversity of
 3 citizenship between Plaintiff and Defendants, Plaintiff filed this action in federal court
 4 on the basis of diversity jurisdiction.

5 **LEGAL STANDARD**

6 For a plaintiff to overcome a Rule 12(b)(6) motion to dismiss for failure to state
 7 a claim, the complaint must contain “enough facts to state a claim to relief that is
 8 plausible on its face.” Bell Atl. v. Twombly, 550 U.S. 544, 570 (2007). “A claim has
 9 facial plausibility when the plaintiff pleads factual content that allows the court to draw
 10 the reasonable inference that the defendant is liable for the misconduct alleged.”
 11 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Factual pleadings merely consistent with
 12 a defendant’s liability are insufficient to survive a motion to dismiss because they only
 13 establish that the allegations are possible rather than plausible. See id. at 678-79. The
 14 court should grant 12(b)(6) relief only if the complaint lacks either a “cognizable legal
 15 theory” or facts sufficient to support a cognizable legal theory. See Balistreri v.
 16 Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

17 In addition, when resolving a motion to dismiss for failure to state a claim, courts
 18 may not generally consider materials outside the pleadings. Schneider v. Cal. Dep’t of
 19 Corrs., 151 F.3d 1194, 1197 n. 1 (9th Cir. 1998); Jacobellis v. State Farm Fire & Cas.
 20 Co., 120 F.3d 171, 172 (9th Cir. 1997); Allarcom Pay Television Ltd. v. Gen.
 21 Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). “The focus of any Rule 12(b)(6)
 22 dismissal . . . is the complaint.” Schneider, 151 F.3d at 1197 n. 1. This precludes
 23 consideration of “new” allegations that may be raised in a plaintiff’s opposition to a
 24 motion to dismiss brought pursuant to Rule 12(b)(6). Id. (citing Harrell v. United
 25 States, 13 F.3d 232, 236 (7th Cir. 1993); 2 Moore’s Fed. Prac. § 12.34[2] (Matthew
 26 Bender 3d ed.)).

27 However, “[w]hen a plaintiff has attached various exhibits to the complaint,
 28 those exhibits may be considered in determining whether dismissal [i]s proper . . .”

1 Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (citing Cooper v. Bell, 628
 2 F.2d 1208, 1210 n. 2 (9th Cir. 1980)). The court may also consider “documents whose
 3 contents are alleged in a complaint and whose authenticity no party questions, but
 4 which are not physically attached to the pleading. . . .” Knievel v. ESPN, 393 F.3d
 5 1068, 1076 (9th Cir. 2005) (citing Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)
 6 *overruled on other grounds by* Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th
 7 Cir. 2002)).

8 **DISCUSSION**

9 **A. Breach of Contract**

10 In the first cause of action, Plaintiff alleges Defendants breached the Project
 11 Documents by unilaterally waiving, in contravention of the contract documents and
 12 without plaintiff’s knowledge or consent, testing and inspection requirements,
 13 including required inspections and tests to ensure that the beds of the irrigation ditches
 14 were properly compacted and otherwise prepared to receive the concrete ditch lining,
 15 and by failing to ensure general contractor compliance with the contract.” (Compl. ¶
 16 13.) Plaintiff contends Defendants agreed to serve as, and did serve as, Project
 17 Engineer pursuant to the Project Documents which specifically detail the authority and
 18 obligations of the Project Engineer, including the duty to supervise and inspect the
 19 work of the general contractor and carry out specific testing requirements.

20 In their motion to dismiss, Defendants argue the Project Document relied upon
 21 by Plaintiff is not, in fact, a contract between Defendants and Plaintiff. Rather,
 22 Defendants argue the Project Document is merely a bid package Defendants prepared
 23 for Plaintiff to issue in preparation for accepting bids from general contractors on the
 24 Project. The Project Document sets forth the parameters for contractors to submit bids
 25 to Plaintiff, the process for the acceptance of a bid, and the general terms under which
 26 the general contractor with the winning bid would work on the Project. Defendants are
 27 not referred to as the “Engineer” for the Project in the Project Document, nor is the
 28

1 “Engineer” for the Project ever identified by name.¹ While the cover page and table of
 2 contents indicate Defendants prepared the Project Document, Defendants argue that
 3 nowhere in the document does it suggest that Defendants would be acting as Project
 4 Engineer or address the particulars of a contractual agreement between Defendants and
 5 Plaintiff. Specifically, Defendants argue: there is no mutual assent of the parties in the
 6 Bid Package, as neither of the Defendants are identified therein and there are no
 7 signatures by any party; there is no manifestation by Plaintiff that it would pay either
 8 of the Defendants a fee to perform engineering work related to the Project so there is
 9 no consideration for Defendants undertaking the obligations of a Project Engineer; and
 10 the Project Document does not set forth any contractual obligations on behalf of either
 11 Plaintiff or Defendants to each other.

12 As an initial matter, the court notes Plaintiff has not referenced any specific
 13 provision(s) within the 150-page document that either support the allegations a contract
 14 existed between the parties or the allegations of breach. Plaintiff alleges generally that
 15 Defendants failed to supervise and inspect the work of the general contractor, but has
 16 not provided any further guidance as to where in the document the purported obligation
 17 to supervise and inspect can be found.

18 Notwithstanding the proposition the court has no threshold duty to mine
 19 voluminous, attached documents to identify provisions or excerpts supporting
 20 Plaintiff’s allegations, the court has performed a cursory review of the document in
 21 order to ascertain its general content and purpose. The document is divided into three
 22 volumes: “Volume I: The Bid,” “Volume II: The Contract,” and Volume III: The
 23 Requirements. In “Volume I: The Bid,” Plaintiff invites bids on the Project from
 24 general contractors and provides instructions regarding the bidding process. “Volume
 25 II: The Contract” is divided into five subsections entitled: “General Conditions of

26
 27 ¹ “Engineer” is defined in the Project Documents as “[t]he District’s Engineer
 28 and authorized assistants, duly authorized by the Manager to act for him.” (Compl.,
 Ex. A at 37.) In the Project Documents, the “Manager” refers to the official
 representative and agent of the District. (Id.)

1 Contract,” “Special Conditions of Contract,” “Contract Agreement,” “Performance
2 Security Form,” and “Advance Payment Guarantee.” In the “General Conditions of
3 Contract” subsection, the document describes the specifics of the relationship between
4 Plaintiff and the general contractor whose bid is ultimately accepted. Among other
5 things, this subsection defines the scope of the work to be performed by the general
6 contractor, the Project requirements, and the payment to be made to the general
7 contractor. Finally, in “Volume III: The Requirements,” the document includes a bill
8 of quantities, technical specifications, and drawings associated with the Project.

9 At this juncture, Plaintiff’s characterization of the Project Document as a
10 contract between Defendants and Plaintiff is unsupported. The Project Document
11 pertains primarily to the relationship between the Plaintiff and the general contractor
12 chosen for the Project. While it is unclear from Plaintiff’s complaint which specific
13 provisions of the contract Defendants allegedly violated, Plaintiff presumably alleges
14 Defendants violated various provisions in “Volume II: The Contract” relating to the
15 “Engineer’s” supervision and inspection of the general contractor’s work. While the
16 anticipated role of the “Engineer” is frequently mentioned throughout “Volume II: The
17 Contract,” it appears the role of the engineer was explained throughout these
18 provisions for the benefit of the general contractor. The Project Document suggests
19 that it would often be the engineer making many of the important decisions regarding
20 the Project’s construction, and the engineer would typically be supervising the general
21 contractor’s work on Plaintiff’s behalf. This would obviously be important information
22 for general contractor’s considering whether to bid on the Project.

23 Despite numerous references to the “Engineer,” the engineer is only ever referred
24 to generally. Plaintiff has not identified any substantive provisions of the Project
25 Document which refer to Defendants as the Project Engineer, “Engineer,” or otherwise.
26 On its face, the court concurs with Defendants that the Project Document appears to be
27 more akin to a bid package created for the consideration of general contractors than a
28 contract between Plaintiff and the Project Engineer, much less a contract between

1 Plaintiff and Defendants.²

2 Of particular concern, the court has not found, and Plaintiff has not identified,
 3 any language in the document suggesting a contractual relationship between Plaintiff
 4 and Defendants. While the document specifically details the terms of the agreement
 5 between Plaintiff and its general contractor, it does not contain any specifics regarding
 6 the duties and obligations agreed to by Plaintiff and Defendants. Moreover, while
 7 Plaintiff alleges in the complaint that it “performed all conditions, covenants, and
 8 promises required by the contract in accordance with the terms and conditions thereof,”
 9 it is unclear from the document what conditions, covenants, or promises, if any, were
 10 made by Plaintiff on behalf of Defendants. See Compl. ¶ 12. All of the obligations,
 11 conditions, covenants, and promises created within the Project Document appear to
 12 have been exchanged between Plaintiff and the general contractor.

13 In sum, Plaintiff has failed to sufficiently allege a breach of contract claim based
 14 upon the Project Document.³ Defendants’ motion to dismiss the first cause of action
 15 is therefore GRANTED with leave to amend.

16 **B. Breach of Fiduciary Duty**

17 The elements of a cause of action for breach of fiduciary duty are: (1) the
 18 existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) resulting damage.
 19 Pellegrini v. Weiss, 165 Cal. App. 4th 515, 524 (2008). A fiduciary relationship is
 20 created between parties to a transaction wherein one of the parties has a duty to act with
 21 the utmost good faith for the benefit of the other party. Gilman v. Dalby, 176 Cal. App.

22 ² Plaintiff objects to Defendants having filed affidavits from individuals attesting
 23 to the lack of a contractual agreement between the parties. (Dkt. No. 13-1.) However,
 24 the court has not considered or relied upon these affidavits in determining that the
 25 Project Document does not appear to be a contract between the parties on its face.
 Accordingly, Plaintiff’s objections are moot.

26 ³ Defendants also argue the alleged contract was not “executed” by Plaintiff as
 required by Public Contract Code § 6106, which requires state agencies and
 27 departments to execute contracts for professional consulting services with engineering
 firms. Plaintiff provides little in the way of response to this persuasive argument,
 28 simply suggesting that a failure to execute would not necessarily mean that no contract
 existed. Because the documents do not appear to comprise a contract, the court need
 not address the lack of execution issue raised under Public Contract Code § 6106.

1 4th 606, 614 (2009). An agency relationship is a fiduciary one, obliging the agent to
 2 act in the interest of the principal. Engalla v. Permanente Medical Group, Inc., 15 Cal.
 3 4th 951, 977 (1997); Mendoza v. Rast Produce Co., Inc., 140 Cal. App. 4th 1395, 1406
 4 (2006).

5 Here, Plaintiff contends Defendants acted as Plaintiff's agent by serving as its
 6 Project Engineer and thus owed a fiduciary duty to Plaintiff as their principal. (See
 7 Compl. ¶ 17.) Because agency creates a fiduciary relationship as a matter of law,
 8 Plaintiff has sufficiently alleged the existence of a fiduciary duty by alleging
 9 Defendants acted as its agent while serving as Project Engineer, regardless of whether
 10 they had a contractual agreement. See Huong Que, Inc. v. Luu, 150 Cal. App. 4th 400,
 11 410-11 (2007) (noting that “either acting as an agent or promising to do so creates an
 12 agency relation” without an underlying contract) (quoting Rest.3d, Agency, § 1.01,
 13 com. d, p. 21). By assuming the role of Plaintiff's agent contractually or otherwise,
 14 Defendants assumed a fiduciary duty as well.

15 However, Plaintiff has not alleged that Defendants breached a fiduciary duty of
 16 an agent to a principal. Plaintiff contends Defendants breached their fiduciary duty “by
 17 unilaterally waiving, in contravention of the contract documents and without
 18 [P]laintiff's knowledge or consent, testing and inspection requirements, including
 19 required inspections and tests to ensure that the beds of the irrigation ditches were
 20 properly compacted and otherwise prepared to receive the concrete ditch lining, and by
 21 failing to ensure general contractor compliance with the contract.” (See Compl. ¶ 18.)
 22 Plaintiff further alleges Defendants failed to disclose and concealed from Plaintiff their
 23 failure to comply with their contractual obligations. (See Id. ¶ 19.) As alleged,
 24 Plaintiff's breach of fiduciary duty claim is based solely upon Defendants' alleged
 25 failure to comply with the specific duties of the “Engineer” as described in the the
 26 Project Document. However, as discussed above, on the present record it does not
 27 appear Defendants owed Plaintiff any contractual obligations pursuant to this
 28 document. Therefore, Defendants cannot have breached their fiduciary duty to Plaintiff

1 by failing to comply with the obligations set forth in a non-binding document or by
2 failing to disclose its lack of compliance with the non-existent contractual obligations.

3 Because Plaintiff fails to state a claim based upon breach of contract, Plaintiff
4 also fails to state a claim for breach of fiduciary duty based upon Defendants' alleged
5 failure to comply with the contract. Accordingly, Defendant's motion to dismiss
6 Plaintiff's second cause of action is GRANTED with leave to amend. Should Plaintiff
7 elect to file an amended complaint, it is ordered to specifically refer to those document
8 provisions which Plaintiff contends (1) resulted in the formation of a contract between
9 these parties; and (2) imposed specific duties upon Defendants.

CONCLUSION

11 For the reasons set forth above, Defendants' motion to dismiss is GRANTED
12 with 20 days leave to amend from the filing date of this order.

13 || IT IS SO ORDERED.

14 | DATED: May 5, 2014

Jeffrey T. Miller
Hon. Jeffrey T. Miller
United States District Judge